CHAPTER IV

"DURING EFFICIENT SERVICE AND GOOD BEHAVIOR"

Municipal civil service failed to accomplish its main objectives, but it did provide Houston police officers with a legal basis upon which to initiate suits. Occupational stability, denied police officers by municipal authorities, was sought by individual officers in the courts. By the terms of the civil service provision in the City Charter of 1897, tenure of office for "all employes in the fire, police and health departments except department heads...depended upon efficient service and good behavior." Dismissals were forbidden unless "an offense of sufficient gravity" could be proven.[1] The gravity of the offense was decided at first by the Police Board and after 1914 by the Civil Service Commission. Violations of this rule provided police officers with the opportunity to seek redress in the courts.

The first case to reach the courts occurred in 1901 with the firing of police officer J.D. Proctor by Chief of Police John J. Blackburn.[2] Proctor's dismissal, which would not have evoked comment before the inclusion of the civil service provision in the charter of 1897, now provoked a crisis that had far-reaching consequences for civil service in Houston and for the institutional development of the police department.

Claiming that he was summarily removed in violation of civil service rules, Proctor appealed Blackburn's action to the Police, Fire, and Health Board. The Board tried his case, found him not guilty of misconduct, and ordered his reinstatement. Mayor John D. Woolford, who viewed the Board's decision as a threat to his control of the police department, encouraged the police chief to refuse Proctor's reinstatement. Woolford contended that the Board's decision conflicted with the powers granted the mayor by the city charter. He argued that since "the term of office of members of the Police force is not fixed by the Charter or Ordinances, police officers...are subject to removal at the pleasure of the appointing power which...is the mayor."[3]

At this point Proctor presented the question to the courts for settlement. He appealed to the district court for a writ of mandamus. The Court upheld the mayor's position and refused to grant the writ.[4] An appeal was then taken to the Court of Civil Appeals, where a judgment was declared in favor of Proctor's reinstatement. Ostensibly, the decision was a victory for civil service. The right of the Police, Fire, and Health Board to

"make all necessary rules and regulations for the...police department" was supported.[5] Chief of Police Blackburn's discharge of Proctor was declared to be illegal and in violation of the civil service procedures stipulated in the city charter. The Court thereby confirmed that Proctor was indeed protected by civil service rules and by so doing, in principle, established the Board as the appropriate administrative agency to regulate the operation of the police department.

With the same stroke of the pen, however, the court undermined civil service as a practical instrument of reform and established itself as the bulwark of municipal supremacy. Noting that Proctor had been appointed on October 19, 1900, and dismissed September 24, 1901, the Court reminded Woolford and Blackburn that policemen defined in the strictest terms were state officers[6] and as such were authorized by the Texas State Constitution to serve a two-year term of office during "efficient service and good behavior." Proctor was therefore entitled to hold his position and receive his salary for two years unless evidence was presented to the Police Board of a violation of "sufficient gravity" to warrant dismissal.[7] The upshot of the decision was that at the completion of his two-year term, Proctor's continuance in office would depend on his reappointment.

The Proctor case was important because it marked the first instance in which a Houston police officer contested his dismissal from the force and was upheld in court on the basis of a civil service provision. One advantage was gained by policemen as a result of the Proctor case. The city could be held liable for ousting police officers in violation of civil service regulations; although such liability was applicable only for a two-year term, the ruling nevertheless was a definite departure from past experience. Prior to the Proctor decision, police officers were reluctant to bring suit against the city, but following it, court dockets were crowded with police cases. Officers, encouraged by Proctor's success, risked the expense of initiating litigation to regain back salaries.

The liability of Houston in such cases was conceded by the city attorney. As he pointed out in a memo of April 22, 1902, the principle was established that the salary attached to a public office was a legal reward for fulfilling the duties of that office. A person legally holding the position was therefore entitled to full compensation for the remainder of his two-year term when, as had been the case with Proctor, he was illegally prevented from performing his duties by a superior officer. In such instances the attorney advised full reimbursement.[8]

The case is most significant for what it failed to accomplish. Arbitrary dismissals of police officers were not halted. Nor did the decision strengthen the position of the Police, Fire, and Health Board as the legal agency for deciding the appeals of suspended or dismissed policemen, firemen, and health officers. Mayor Woolford and his successors refused to relinquish

their control of police appointments and dismissals. Although according to the 1897 charter and subsequent charters the mayor was allowed to remove only department heads, the restraint was merely nominal. Instead of the mayor's directly removing the rank and file as in the past, dismissal was now usually accomplished through department heads.

One year after the *Proctor* decision the civil service law was again tested when a series of suits was filed by fifteen former police officers seeking recovery of salaries lost as a result of their dismissals from the force.[9] In the rulings in these cases the courts attempted to define the limitations of civil service applicability. The judges sought to reconcile the contradition of the civil service provision of tenure during "efficient service and good behavior" and the two years of service limitation in the Texas State Constitution. Judgments totalling $19,683 were awarded twelve of the officers by the Sixty-First District Court for the period from the date of their dismissals to the termination of their two-year terms.[10] All the decisions were taken to the Appeals Court on writs of error either by the city or by officers dissatisfied with the amount of settlement.[11]

The cases were divided into categories. One group based the claim for recovery on the *Proctor* decision, and a second group, represented by Gus Albers and J.A. Estes, sought to expand the protection of civil service beyond that established in the *Proctor* case.[12] The decisions in these two cases were of particular importance because of the implications they raised. The suits involved the right to recover salary beyond the original two-year period of service. In the *Proctor* case, recovery concerned only service performed within the two-year period. In effect, the cases pressed the issue of what constituted a police officer's tenure of office under the civil service clause of "efficient service and good behavior." The first of the cases, that of Albers, involved a police officer who had allegedly been wrongfully dismissed by order of the mayor. Upon reviewing the case, the city council recommended that Albers be reappointed, but Chief of Police Blackburn refused to reinstate him. Albers, who was first appointed in 1898 and dismissed in 1902, sought recovery for the portion of his salary lost during the period of his dismissal that involved his service beyond the expiration date of his original appointment. The district court awarded Albers $663, but the city appealed and the decision was reversed.[13]

According to the Texas Court of Civil Appeals, Albers, though dismissed illegally, was not entitled to recovery because no proof existed that he was ever reappointed to office. "It follows," the Court continued, "that an appointment upon the police force of the city only gives the appointee a right to the office for a term of two years, and when that term expires, unless he is reappointed, he ceases to be *de jure* officer, and the liability of the city for his salary as such officer ceases." His service on the police force and the acceptance of his service by the city made him a

de facto officer entitled to compensation. Since Albers had not been reappointed, however, the court ruled that when the city terminated his services it incurred no liability for the salary he would have earned even though the dismissal violated the procedures set forth in the civil service provision.[14]

Unlike Albers, Estes had been illegally ousted within the two-year period of his service. The district court awarded him his salary for that portion of the two-year term during which he had been dismissed but at the same time refused to support Estes's claim for compensation for the period from the date of his ouster to the date of his trial.[15]

The case was appealed by the city and cross-assignments were presented by Estes. Estes maintained that he was entitled to recovery beyond the two-year term because, under the existing civil service regulations, his tenure was commensurate with good behavior and efficient service and he could not be removed from office except with the approval of the Police, Fire, and Health Board. His dismissal, Estes asserted, was in violation of these rules. The appellate court affirmed the lower court's judgment for Estes, but rejected his claim of extended protection under civil service. The court held that the civil service rules were applicable only for the two-year term set by the state constitution. The liability of the city was confined to that specific period. The court contended that the effect of the provisions cited by Estes, if accepted, would "constitute an office for life, if good behavior and efficient service were commensurate.... It has been settled that, since the Constitution limits the terms of all officers not otherwise fixed to two years, this provision will be construed to fix tenure at the constitutional term, subject to the provision of removal for cause during that time.... The unconstitutional provision may be discarded without nullifying the entire law."[16]

Civil service laws could not circumvent the state constitution by allowing continuance in office to be assumed at the end of each two-year term because of satisfactory performance. Tenure "during good behavior" was only valid if applied within the two-year term. If the letter of the law was to be adhered to, the service of police officers was to terminate at the expiration of the two-year term, with reappointment following the completion of a qualifying examination. In practice those policemen who were favored by the administration were allowed to continue without formal appointment. In later years, all pretense of making official appointments was abandoned, and appointees served as *de facto* police officers. Matters were simplified since neither entrance nor qualifying examinations existed. Police service became at best a temporary occupation.

As political patronage became an increasingly important aspect of police service after 1920 and civil service became increasingly subservient to the patronage system, appeals to the commission became a rarity and recovery of salaries unknown. Most officers realized the futility of exercising the

right of appeal and accepted political firings stoically. Tenacious police officers who pursued a hearing found that their dismissals were upheld by the commission.[17] Encouraged by the ruling in the *Estes* case and the generally unsympathetic stance of district court judges toward the civil service laws, the city council and mayor were inclined to risk lawsuits and continued to refuse compensation.

Compensation to policemen because of illness or injury was not affected by these decisions. Relief was granted at the discretion of the city council. Such petitions were usually given more consideration than petitions for loss of salaries, but no set rule existed to insure a consistent policy. No cases of this type were ever tested in the courts, even those which involved job-connected injury or illness.

During the interval between the 1904 *Estes* decision and 1933, no effort was made by police officers to challenge the patronage system in the courts. Although the *Proctor* decision and other rulings established the right of police personnel to contest illegal firings, much of the significance of this achievement was lost, for the *Estes* decision, supported by subsequent rulings, mortally wounded civil service as an instrument of police reform. The two-year tenure of office as strictly interpreted by the courts placed service in the police department at the pleasure of each new administration. Moreover, the right to challenge illegal dismissals was undermined by the enactment of a civil service rule in 1914, which stipulated that appeals to the district court from decisions of the Commission could be made only on the grounds that the Commission had acted with gross negligence or with prejudice. Since such charges were generally impossible to prove, appeals were seldom attempted. The expense of attorney fees and the narrow legal interpretation given civil service laws by the courts deterred all but the most determined men.

No cases involving violations of the civil service laws reached the courts between 1905 and 1933. The re-election of Mayor Holcombe in 1933, however, heralded a series of suits filed by police officers during the next two years. Holcombe, in his effort to re-establish his political influence in the police and other departments of the city, committed numerous violations of the civil service rules, dismissing or demoting over a hundred city employees during the first weeks of his administration. Thirty of the employees filed suit for reinstatement.[18] The undisguised political motivation of the mayor's actions encouraged appeals to the courts. At one point, the mayor boldly declared during an interview with a newspaper reporter that he intended to oust a police captain for political reasons.[19] Shortly thereafter the mayor acted upon his intentions. In another instance Holcombe notified an officer in writing that he had personally ordered his dismissal from the department, thus breaking with the tradition of firing through the department head, which had become the practice following the

Proctor decision.[20] Since the Holcombe dismissals ignored even the minimal authority of civil service as set forth in the *Proctor, Albers,* and *Estes* decisions, hope lingered that the new administration would be held accountable for at least the two-year tenure guaranteed police officers "during good behavior and efficient service."[21] Moreover, the civil service structure established by the ordinance of 1914 had not yet been tested in the courts. The amendment to the city charter of 1913, unlike the civil service charter amendment of 1897, was followed by the enactment of an ordinance outlining a civil service program in detail. The ousters by Holcombe provided an opportunity to evaluate the applicability of the ordinance.

Three cases determined the outcome of the court test. In two of the cases the courts dealt with the issues of dismissal procedures and appointment requirements under civil service. The third case involved both issues, but reached the court as a consequence of the efforts of two officers to expose the department's involvement in the city's gambling operations. Together the decisions in these cases determined the legal status of the police department under municipal civil service and the extent of the powers of the mayor over the administration of the department.

The first case arose in 1933 with the dismissal of W.R. "Bobby" Ellis from the police department. Litigation in the case lasted two years and was carried from the district court to the state supreme court. Ellis had been appointed during the Monteith administration as superintendent of identification in the police department, a position which he held from 1929 until his dismissal in 1933. At that time, Holcombe took office following a hard-fought election and proceeded to reorganize the police department by appointing his campaign manager George E. Woods to the position of Director of the Department of Public Safety. Shortly after Woods assumed office, Holcombe instructed him to oust Ellis as superintendent, and Ellis subsequently filed for a hearing with the civil service commission. In the meantime Holcombe appointed Henry E. Keller, a relative of his wife, to Ellis's position and notified the latter that he had been removed by his personal instructions.[22]

Holcombe contended that several sections of the city charter of 1905 empowered him to remove at his discretion any city employee or officer with the exception of an elected official.[23] According to Holcombe's argument, the civil service amendment of 1913 did not supersede or curtail the prerogatives of the mayor as set forth in the charter. Although the civil service amendment stated that city employees could be dismissed only by the heads of departments, Holcombe's view was that the mayor or city council could directly order removals without granting a civil service commission hearing. Appeals to the commission were available only to employees dismissed by department heads, as would be the case in the discharge of police officers fired by the chief of police. Employees classified

as appointed officers or officers whose positions were created by ordinance or charter served only at the discretion of the mayor. This latter allegation was directed specifically at Ellis, who, the mayor asserted, was a city officer and not a state officer subject to the two-year tenure provision of the constitution.[24] Holcombe's argument, if accepted, would have eliminated even the principle of civil service and would in fact have legalized the practices of political patronage that had dominated the operation of the police department since its earliest days.

The issues were presented to District Judge Roy F. Campbell in June 1933, when Ellis filed for a writ of mandamus after he failed to receive a hearing before the civil service commission. Campbell sustained the city's general demurrer,[25] ruling that the mayor's unlimited power to dismiss any city employee except an elected official remained valid under the provisions of the 1905 city charter. The right of a city employee to appeal to the commission was applicable only when a dismissal was ordered by a department head. Moreover, Campbell denied that a writ of mandamus could be issued against the city council, mayor, or civil service director.[26] Campbell's ruling justified Holcombe's boast that once he removed a civil service employee, that employee "stay[ed] fixed" and was not entitled to appeal his case to the commission.[27]

The decision was appealed to the Court of Civil Appeals, however, with Ben Campbell, the former mayor, under whose administration the civil service amendment of 1913 was enacted, acting as a special counsel for Ellis. In its opinion of February 1934, the Court of Civil Appeals reversed the district court's decision. Chief Justice R.A. Pleasants, in a lengthy decision, examined those sections of the civil service amendment pertinent to removal procedures and each section of the city charter upon which the administration asserted its removal power. Pleasants found that the provisions of the civil service ordinance could only be construed as repealing the original charter articles relating to the removal powers of the mayor and city council. "It seems clear to us," he declared, "that these provisions of the amendment [establishing the procedures for removing city employees] comprehend the entire subject of removing city employees classified under the civil service amendment, and create an independent and exclusive method for the removal of such employees."[28]

Particular attention was devoted to political patronage. While the court conceded that "it was human for the mayor to prefer his political friend for any position of employment by the city at his disposal," Holcombe was reminded that such reasoning was "certainly no cause for removal of a faithful efficient public employee protected by the civil service amendment....The justice and wisdom of...civil service legislation is apparent." The court affirmed Ellis in his right to a writ of mandamus.[29]

The city appealed to the State Supreme Court, which sustained the

opinion of the Court of Appeals and returned the case to the district, where hearings were begun on points of law and fact. Ellis amended his original petition to seek compensation for his lost salary in addition to reinstatement. Ellis won the points of law and later during the hearings on the points of fact he had the satisfaction of hearing Judge Allen Hannay threaten to jail and "fine to the limit" the city attorney, Mayor Holcombe's lawyer, and the Director of Civil Service for disregarding a court subpoena for civil service records.[30] Judge Hannay's stern warning was the only real satisfaction the advocates of an effective civil service received from the tedious years of litigation, for during the second hearing on points of fact Ellis suddenly collapsed and died of a heart attack. His untimely death brought the litigation to an inconclusive end. Ellis's wife resumed proceedings and filed suit for compensation for her husband's lost salary; she was granted more than $4,000 by the city council, which was anxious to terminate further litigation.[31]

The opinion in the *Ellis* case reaffirmed the *Proctor* decision that police officers were entitled to a two-year tenure with dismissals subject to the procedures prescribed in the civil service regulations. Ellis's lawsuit was concerned with the right of a civil service employee to receive a hearing before the civil service commission and not with the merit of the dismissal. The court nevertheless addressed itself to the legality of civil service and the responsibility of the mayor and city council to adhere to its regulations. Holcombe's extravagant claims of his removal power over police officers were cited by the court and rejected, but it noted that final disposition of the question would have to be settled strictly on the merits of Ellis's removal.[32] Ellis's death terminated further litigation, and the question of the merit of the ouster was not ruled upon by the courts. While litigation in the *Ellis* case was in progress, however, the issue of the mayor's power to dismiss a civil service employee was moving toward a resolution in the E.F. Grota case.

In 1933 Grota, a warrant officer responsible for assisting the clerk of the Corporation Court in the preparation and issuance of writs and summonses, received notification of his discharge from the police department soon after Holcombe was elected mayor. Grota charged that his ouster was motivated by his vote against Holcombe and not, as claimed by Holcombe, because of the need to reduce the city's expenditures. The mayor, Grota asserted, was attempting to destroy civil service in order to organize a political machine. Grota pointed out that even if economic conditions had been responsible for his dismissal, the action was still illegal, for according to civil service regulations only those persons placed last on the list of classified civil service employees could be removed, and Grota's service with the city had been longer than many of the mayor's recent appointees. In his petition, Grota sought a writ of mandamus to compel the civil service

commission to grant him a hearing. He also requested an injunction to halt the mayor's interference in the operation of the civil service commission.[33] Grota's assertion that he was a classified civil service employee compelled the court to examine the merits of the removal.

City attorney R.R. Lewis did not dispute Grota's charge of political patronage in the general demurrer filed for the city. Lewis advanced the argument that even if Grota's assertions were true, his removal was nevertheless within the mayor's prerogative since Grota, like all other police department personnel, was not a classified civil service employee. Lewis contended that the civil service charter amendment approved by the voters in 1913 had abolished the city's police department as it had existed prior to approval of the amendment. Re-creation of the department to conform to the civil service amendment depended on the enactment of ordinances by the city council. Since such action had not been taken by the council, the argument continued, police officers were not officers *de jure* and were subject to dismissal at the mayor's discretion. Specifically, it claimed the ordinance creating the position of warrant officer was imprecise in that it failed to state the exact number of such officers and the mode of appointment.[34] Furthermore, Grota did not obtain his position through a competitive examination as prescribed in the civil service amendment, which stated that classified civil service employees first had to perform satisfactorily in an "open, competitive and free examination." The amendment assigned the civil service commission the responsibility of devising and administering the examinations.[35] Since the civil service commission had failed to fulfill its responsibility, however, appointments to the police force and other city departments were usually made by the mayor or department heads. Consequently, police officers were not classified civil service employees and could be removed at the mayor's discretion.

The case was argued in district court in October 1935. Judge Ewing Boyd in a decision issued in November sustained the city's general demurrer and found that Grota's dismissal had not violated civil service regulations. Concurring with the city attorney, Boyd held that the civil service commission had failed to carry out the provisions of the charter amendment, and the city council had not enforced compliance with those ordinances it had already enacted. Houston's civil service was a framework, Boyd asserted, without the substantive detail to make it a functioning system. A complete reorganization of civil service by the city council was required. Boyd charged that the section in the city charter pertaining to the creation of the corporation court and its officers (among them warrant officers) failed to specify the duties of the officers or the number of positions for that classification, making it therefore incompatible with civil service regulations.[36] Grota could claim the status of an officer *de jure* under the

civil service protection only if the duties of his position were defined by ordinance. An officer, the judge asserted, could not claim the benefits of the law when the law was not complied with. Boyd recognized that stability was required in the police department, but he did not believe it could be obtained through the existing civil service program, as he indicated in his closing remarks:

> The thing that would have rendered it [civil service] stable was to remove the indefiniteness that theretofore existed in reference to the number of persons that should constitute the roll of policemen; that should constitute the number of warrant officers. The people were, and are, entitled to know how many persons were going to be on their payroll, and up to this time no ordinance declares how many policemen, how many warrant officers have been created. No ordinance informs us whether it consists of a large number of officers and one policeman or of the commanding officer and a thousand privates. The indefiniteness still exists and the Civil Service program has failed because of the failure of the City Council to do that thing which the ordinance, and every intendment, implication and suggestion of the ordinance called on them to do.[37]

Although the decision was appealed, the ruling had an immediate impact on the police department as well as on the other city departments that were under civil service classification. In effect, even the appearance of civil service regulations was removed from the administration of the department, since application of the decision extended to all members of the police force who had not been officially reappointed to their positions. The indefiniteness that the court noted in the creation of the position of warrant officer also applied to all positions within the department except chief of police. As a result of the decision, Holcombe became in fact "the boss of the police department by self-decree," as his control over the department was later described.[38] In effect, the ruling set the occupational status of Houston police officers back to the nineteenth century.

The *Grota* decision, while upholding the dismissal, was a two-edged sword, for the Holcombe administration was now burdened with the task of correcting the defects in the civil service program, at least to the point of satisfying the court. A major defect citied by Judge Boyd was the civil service commission's failure to conduct competitive examinations. Plans were made for instituting examinations for all municipal employees, but opposition to the plan by the incumbent city employees postponed their implementation.[39] The second defect, which was the basis for Boyd's decision, was the indefiniteness of the ordinance creating positions in the police department. To remedy the imprecision of the ordinance, the city's legal department prepared an amendment to the city charter stipulating that no appointment to a position could be made unless the position had been created by ordinance. If the position required more than one officer, the ordinance would also have to state the maximum number of officers per-

mitted to hold the position.[40]

The proposed changes became part of twenty-six amendments offered to the voters in October 1938 as a plan for improving the quality of city government. All twenty-six were rejected, and the civil service program continued without major alterations until 1948.[41] The *Grota* decision did not improve the quality of civil service protection for police officers. Instead, because it invalidated the existing program—though it was inadequate—police officers now found themselves without a basis for legal recourse against the most irresponsible actions of the mayor or chief of police.

Their vulnerability was clearly demonstrated by the circumstances surrounding the suspension of officers S.T. Roe and W.L. McGrew in October 1935. Roe and McGrew were suspended after they charged that the gambling laws were not being enforced by the police department and that information obtained from a local gambler indicated that Chief of Police B.W. Payne was involved in the city's slot-machine operations. In an affidavit to the city council the officers petitioned for an investigation into the department and its possible involvement in gambling operations. Payne, denying the charges, cited the recent demotion of both men from the rank of detective to patrolman as the reason for the charges, and ordered Roe and McGrew suspended. Other officers who had assisted in preparing the affidavit were also scheduled for suspension or demotion on charges of cursing, using abusive language, inefficiency, and insubordination. Shortly after their suspension both men were taken from their homes under the escort of police detectives to the mayor's office, where they were placed under guard until questioned about the charges. Following their session in the mayor's office, the men sought to file charges against Payne in Justice of the Peace courts. Charges were rejected, however, by Judges Tom Moes and J.M. Roy pending possible inquiry by the grand jury.[42]

A confusing series of events followed. Investigations were immediately launched by the grand jury, civil service commission, and city council, with the latter suspending Payne until the conclusions of the inquiries. The suspension was effected over the veto of Holcombe, who insisted that Payne remained the lawful chief of police. The mayor instructed Payne to deny the council's action. Holcombe then called a halt to the council's investigation, declaring that there was no evidence to support the charges against Payne. The council again voted to suspend Payne, as it was to do twice more within the next three weeks. In an effort to exert pressure on Holcombe, the council refused to approve the November payroll voucher for the police department so long as Payne's name remained on the list of active officers. Holcombe warned that he would not sign the voucher if Payne's name was not included on the payroll. At this point, the solidarity of the council broke. Councilmen F.L. Holton and S.A. Starkey met with

Holcombe in a clandestine session held after the usual business hours, and reappointed and confirmed Payne as chief of police. In the meantime, the grand jury, which had summoned several city officials—including Holcombe—to appear as witnesses, concluded its inquiry with hardly a mention of the business that had been the subject of investigation for two weeks.[43] The turmoil over Payne, which had wracked the city government and police department for over a month, subsided. For Roe and McGrew, however, it continued.

In the midst of the chaotic confrontation between Holcombe and the city council, Roe and McGrew appealed to the civil service commission for a hearing. The commissioners called a series of preliminary meetings to decide the merit of granting the officers a hearing. Sharp exchanges broke out between James E. Kilday, attorney for the officers, and Richard R. Lewis, city attorney, who accused his adversary of using the inquiry as a forum to advance his political aspirations.

Roe and McGrew reiterated their charges against Payne, citing his reputed connections with local gambling interests and asserting their right to a formal hearing. Lewis argued the same objections to granting a hearing that he had presented at the Grota trial. According to Lewis, Roe and McGrew were not civil service employees because they had neither competed in a competitive examination nor received reappointment after completing two years of service with the police department.

Special attorney Elbert Roberts was employed by the legal department to evaluate the merits of the case. His task was eased by the *Grota* decision, which was rendered while the commission was still deciding the fate of Roe and McGrew. On the basis of the *Grota* decision, Roberts recommended that their requests be denied because of a lack of jurisdiction. The commission accepted the recommendation.

Despite the *Grota* ruling, the two former officers considered an appeal to the district court.[44] The appeals were postponed, however, pending the outcome of Grota's decision to continue litigation. In December 1935 Judge Boyd refused to accept Grota's amended petition, referring to it as a legal "monstrosity" concocted by Kilday.[45] On August 1, 1936, the Court of Civil Appeals, in a decision delivered by Chief Justice R.A. Pleasants, reversed the district court and granted Grota his request for a writ of mandamus. If such a hearing substantiated Grota's claim that he had been illegally removed, as Pleasants indicated it would, the city must, he continued, reimburse Grota for the sum lost during the period of his removal. The chief justice also restated the position of the court in the earlier police cases that the two-year tenure of the state constitution was not in conflict with civil service regulations.[46] Pleasants based the court's decision largely upon the ruling in the *Ellis* case, finding in both instances that the issue was the integrity of the civil service law as it applied to police officers.

As in the *Ellis* case, Grota's success was short-lived. The city appealed to the Texas Supreme Court where the decision was reversed.[47] The court disagreed with Pleasants's contention that the issue in the *Ellis* case was the same as that in the *Grota* appeal. In the *Ellis* case, the court noted, the rights of a city employee were involved, not those of an officer, as Grota claimed to be.[48] The *Ellis* ruling could not therefore serve as a precedent for the judge's opinion in the later case. In reversing the decision, the court cited as its authority a Civil Appeals ruling in 1914, which concerned the removal of a San Antonio police officer.[49] In that decision, as in the *Grota* case, the issue was whether a position in the police department had been legally created by the city when the precise number of positions was not stipulated. The court's reply in the San Antonio case was that the position was not legally constituted. Similarly, the present court held that because of imprecision in the language of the ordinance, the position Grota held was not legally created and therefore he could not claim civil service status.[50]

The defeat was complete. No ordinances to correct the defects in the civil service program were approved, and the courts placed the police department outside the jurisdiction of the existing system. The inherent weaknesses in the civil service structure, the two-year tenure provision of the state constitution, and the rules of practice and procedure governing civil suits (notably the general demurrer used by the city[51]) all worked against establishment of a stable police department. As the arbiters of anachronistic laws, the courts became the unwitting ally of the municipal spoils system. After the *Grota* decision there were no cases of police officers initiating litigation against the city because of political removals until 1948. The Roe-McGrew controversy was not repeated until a fair hearing, supported by adequate legal recourse, was guaranteed. Until that time infractions of the law, discriminatory law enforcement, and political manipulation were borne in silence as a condition of employment.

One obstacle to later reform was removed in 1940, when a state constitutional amendment excluding classified civil service positions from the two-year limitation clause was approved.[52] Supported by reform-minded state legislators and approved overwhelmingly by the voters, the amendment lessened the inconsistency that had hampered the effective administration of civil service from its inception in Houston and throughout Texas. But passage of the amendment did not insure civil service reform or put an end to the political abuses that had plagued the operation of the department. Political patronage continued. The structural weaknesses of municipal civil service remained, and access to the courts was as difficult as before. These persisting conditions, combined with the failure of individual police officers to effect change through the courts, provided the incentive for a collective effort.

NOTES

1. *Charter and Revised Code of Ordinances of the City of Houston* (Houston, 1897), p.19.

2. *Proctor v. Blackburn et al.* (Tex. Civ. App. 1902) 67 S. W., pp. 548-550; Petition for salary to Police Committee, Mayor and City Attorney, Miscellaneous Papers, 1900-1902, Packet dated April 22, 1902, HCAC; Houston *Post,* October 1, 1901.

3. Letter from Mayor John D. Woolford to City Council, October 7, 1901, Miscellaneous Papers, 1900-1902, Packet dated November 11, 1901, HCAC.

4. Houston *Post,* November 19, 1901.

5. *Charter and Revised Code of Ordinances of the City of Houston* (Houston, 1897), p. 20; *Proctor v. Blackburn,* 67 S. W., pp. 548-550.

6. The doctrine that policemen are agents of the state and not the municipality was established in New York in 1859 in the decision of *People v. Draper,* 15 NY532, affg. 25 Barb 344, in which the state's creation of a metropolitan police department was upheld. Creation of the metropolitan police force by the state was a sharp break from the former policy established in the home rule provision of the state constitution, that policing was a concern of local authorities. In subsequent years the New York decision was affirmed in the courts of twenty states. In Texas the issue was settled in *Rusher v. Dallas,* 83 Texas 151, 18 S. W., p. 333. See also Eugene McQuillan, *The Law of Municipal Corporations,* 3d ed. (Chicago, 1972), vol. 16, pp. 561-562.

7. *Proctor v. Blackburn,* 67 S. W., pp. 548-550. The Proctor ruling was reaffirmed in *Cawthon v. City of Houston* (Tex. Civ. App. 1902), 71 S. W., pp. 329-330.

The court's decision was based on Art. 16, Sec. 30 of the Texas State Constitution of 1876, which stipulated that "the duration of all offices not fixed by this Constitution shall never exceed two years." Precedent was established in Tex. 1895, *City of San Antonio v. Micklejohn,* 89 Tex. 79, error refused, in which the court ruled that "the term of office not having been fixed in the ordinance which created it, it was not controlled by that provision of the constitution which limits the terms of all offices not therein scribed to the period of two years." See also John F. Dillon, *Commentaries on the Law of Municipal Corporations,* 5th ed. (Boston, 1911), vol. I, pp. 174-175 and 675-676.

8. Memo from City Attorney T.H. Stone to the Mayor and City Council, April 22, 1902, Miscellaneous Papers, 1900-1902, Packet dated November 11, 1901, HCAC.

9. The implications of the suits were immediately recognized by city attorney T.H. Stone, who encouraged the city to seek a decision by the courts. See Letter from T.H. Stone to the Mayor and City Council dated April 27, 1903, Miscellaneous Papers, 1902-1903, HCAC.

The policy of reimbursement was reaffirmed in 1919 in the case of D.E. Drennan. In response to Drennan's application for reimbursement after winning reinstatement following a successful appeal to the Civil Service Commission, City Solicitor W.J. Howard advised the City Council to accede to the officer's request. Inter-office memo from City Solicitor W.J. Howard to the Mayor and City Council dated July 5, 1919, Miscellaneous Papers, May 13, 1918-July 29, 1919, Packet dated June 2, 1919-July 29, 1919, HCAC.

10. Houston *Post,* September 11, 1903.

11. Ibid.

12. *City of Houston v. Gus Albers* (Tex. Civ. App. 1903), 93 S. W., pp. 1084-86; *City of Houston v. J.A. Estes* (Tex. Civ. App. 1904), 79 S. W., pp. 848-851.

13. *City of Houston v. Albers,* pp. 1084-86; City Council Minutes, Bk. L, February 24, 1902, pp. 487-488; Bk. M, May 26, 1902, p. 9; Bk. M, June 30, 1902, p. 63, HCAC.

14. *City of Houston v. Albers,* p. 1086.

15. *City of Houston v. Estes,* pp. 848-851.

16. Ibid., p. 850.

The position of the court regarding the status of civil service was summarized in *City of Houston v. Mahoney* (Tex. Civ. App. 1904), 80 S. W., p. 1144:

> It is settled that, in so far as the Legislature undertook to make the term of a policeman commensurate with good behavior, the charter is unconstitutional, but that it will be given effect to the extent of a two-year term, and that its provision forbidding a discharge during the term, except upon trial for cause, is also valid.

The court severely restricted the applicability of civil service regulations but it refused to invalidate the rules *in toto*. In several cases in which municipal authorities challenged the constitutionality of civil service, the court held that civil service rules requiring employees to hold office during "good behavior" did not conflict with the two-year limitation clause of the constitution if the office was not held beyond that period. See *Callaghan v. McGown* (Tex. Civ. App. 1905), 90 S. W., p. 319, error refused; *Callaghan v. Tobin* (Tex. Civ. App. 1905), 90 S. W., p. 328, 40 Tex. Civ. App. p. 441, error refused; *Callaghan v. Irvin* (Tex. Civ. App. 1905), 90 S. W., p. 335, 40 Tex. Civ. App. p. 453, error refused.

17. A survey of the inactive personnel files of the Houston Police Department for the period 1920-1949 revealed that most officers who were victims of political patronage ignored the right of appeal. One problem in surveying the files was to determine which officers were dismissed or suspended for political reasons or for legitimate disciplinary reasons. The clue to the distinction was the phrase frequently observed in the files, "dismissed for the good of the service." This phrase, listed in the civil service manual as a justifiable cause for dismissal, fulfilled the need for a non-specific excuse to use when no legitimate infraction of the rules existed. (See municipal booklet, *Civil Service Commission of the City of Houston* [Houston, 1929], p. 58.) By contrast, files reporting dismissals, suspensions, and demotions as a result of disciplinary action contain specific details of the offenses. Frequently, such files contain the findings of police investigators, statements by the officers involved as well as those of the complainants, and the recommendations by the ranking office. See also Houston *Post,* February 25, 1934.

18. Petition for H.J. Meinke, No. 219097 filed in the Court of Civil Appeals for the 80th Judicial District of Texas on October 29, 1934, p. 20, *H.J. Meinke v. Oscar F. Holcombe, et al.,* Harris County Court Records (hereinafter cited as HCCR), Harris County Court Building, Houston, Texas; Houston *Press,* October 15, 1935.

19. Petition for Mandamus and Injunction filed in the Court of Civil Appeals for the 127th Judicial District of Texas on March 25, 1935, p. 12, *Roy Young v. Oscar F. Holcombe, et al.,* HCCR.

20. Brief for Appellant, No. 10104, in the Court of Civil Appeals for the 1st Supreme Judicial District of Texas at Galveston, *W.R. (Bobby) Ellis v. Oscar F. Holcombe, et al.,* TRHPL.

21. The two-year term of office as applied to civil service was reaffirmed in 1934 in *McDonald et al. v. City of Dallas et al.* (Tex. Civ. App. 1934), 69 S. W. (2d), pp. 175-180. The decision in this case closely followed that of the *Proctor* case. Compensation was granted six Dallas policemen for the period of their two-year tenure during which they were suspended from performing their duties.

22. *Ellis v. Holcombe,* 69 S. W. (2d), p. 449, error refused; Brief for Appellant, No. 10104, in the Court of Civil Appeals for the 1st Supreme Judicial District of Texas at Galveston, pp. 1-3, *W.R. (Bobby) Ellis v. Oscar F. Holcombe, et al.,* TRHPL.

23. The pertinent charter provisions are:

> Article 5, Section 2: The Mayor shall have power...to appoint and remove all officers or employees in the service of the city for cause, whenever in his judgment the public interests demand or will be better subserved thereby; and no officer whose office is created by ordinance shall hold the same for any fixed term, but shall always be subject to removal by the Mayor or may be removed by the City Council.
>
> Article 7, Section 8: The City Council shall...have power to establish any office that may...be necessary or expedient for the conduct of the city's business...provided, however, that all officers established by the Council shall be subject to discontinuance or be abolished by the council at any time and any incumbent of any office may be removed at any time by the Mayor, with or without the concurrence of the Council; and in no case shall any officer or employee of the city be entitled to receive any compensation or emolument of any office, which may be abolished or from which he may be removed, except for services rendered to the case when the office was abolished or the incumbent removed...." *Revised Code of 1914,* pp. 49 and 59.

24. *Ellis v. Holcombe,* 69 S. W. (2d), pp. 452-453; Houston *Post,* February 9, 1934.

25. The use of the general demurrer was an important rule of civil procedure, which proved an effective means of defense by the city in the suits filed by police officers before 1940. A general demurrer allowed a party responding to the pleading of a complainant to set forth general objections without having to dispute the specific facts or charges presented in the suit. This was done either by denying the facts or by conceding them but rejecting the contention that they qualified the pleader for remedy from the court. General demurrers were frequently accompanied by special exceptions which allowed the defendant to raise objections to "defects in form" in the plaintiff's charges. Special exceptions, which rarely had any relevance to the merits of the dispute, served merely to impede litigation. In the E.F. Grota case, the city presented seventy-six such exceptions. The general demurrer and special exception were effectively used by the city in all the police cases under review here. In none of the cases did the city respond to the specific allegations of the plaintiffs. The Texas Supreme Court in 1939 revised the Rules of Civil Procedures and prohibited the use of general demurrers. See *Texas Jurisprudence,* 2nd edition (San Francisco and Rochester, 1963), vol. 45, pp. 362-363, 564, 567, 568-571, and 581-584.

26. Brief for Appellant, No. 10104, in the Court of Civil Appeals for the 1st Supreme Judicial District of Texas at Galveston, pp. 4-5, TRHPL; Houston *Post,* June 11, 1933.

27. Houston *Post,* June 11, 1933, and February 9, 1934.

28. *Ellis v. Holcombe,* 69 S. W. (2d), p. 454.

29. Ibid., p. 453.

30. Houston *Post,* February 27, 1935; Houston *Chronicle,* February 27, 1935.

31. Petition dated March 5, 1935, No. 210, 539, in 11th Judicial District of Texas. *W.R. (Bobby) Ellis v. Oscar F. Holcombe, et al.,* HCCR; Houston *Post,* February 28, 1935; Houston *Press,* November 15, 1935.

32. *Ellis v. Holcombe, et al.* (Tex. Civ. App. 1934), 69 S. W. (2d), p. 455.

33. *Grota v. Holcombe, et al.* (Tex. Civ. App. 1936), 97 S. W. (2d), pp. 302-304; Houston *Press,* December 6, 1935.

34. Houston *Press,* October 18, November 15, and December 6, 1935; *Grota v. Holcombe, et al.* (Tex. Civ. App. 1936), 97 S. W. (2d), pp. 301-306.

35. Article V, Section 2 of the Civil Service Amendment in the City Charter of 1913 provided that

> The Civil Service Commission...shall provide for the classification of all employees eligible to civil service, except day laborers, and of all officers and appointees, including peace officers and firemen, except the heads of departments....The Civil Service Commission shall also make provision for open competitive and free examination....

The Revised Code of Ordinances of the City of Houston of 1914, p. 53.

Also see *Civil Service Commission of the City of Houston, 1929* (Houston, 1929), which details the civil service regulations in effect at the time of the *Grota* litigation.

36. Houston *Post,* November 16, 1935; Houston *Press,* November 15, 1935; *Holcombe et al. v. Grota* (Tex. Sup. Ct.) 102 S. W. (2d), pp. 1041-45; see Article II, Section 13, in *The Revised Code of Ordinances of the City of Houston of 1914,* p. 17.

37. *Holcombe et al. v. Grota* (Tex. Sup. Ct. 1937), 102 S. W. (2d), p. 1045.

38. Houston *Press,* October 2, 1940.

39. The effect of the ruling aroused grave concern among city employees, particularly among those who had the longest service with the city. Nearly eighty per cent of the 1800 city employees were affected by Boyd's decision. The older employees, who in many instances lacked the formal education necessary to compete successfully in competitive examinations with younger and better educated applicants, felt that enforcement of the examination requirement would jeopardize their jobs. Interest in unionization was stimulated, and on November 29, 1935, a hundred city employees met to discuss the possibility of organizing a unit of the A.F.L. An alternative solution was found, however, with the submission of an amendment to the city charter exempting all city employees with at least one year of service in a classified civil service position from having to take competitive examinations. Houston *Post,* November 28, 1935; Houston *Press,* November 27 and 30, 1935; Houston *Chronicle,* November 30, 1935, and December 3, 1936.

40. Houston *Press,* November 27 and 29, 1935.

41. Charter Amendments, 1937: A Petition Presented to the Members of the City Council by Qualified Voters to be Submitted to the Voters of Houston, dated August 14, 1937, TRHPL; Houston *Post,* August 12 and October 4, 1938. For a valuable source of information regarding the campaign for changes in the charter, see Houston (Tex.), Charter Commission (1938) (Scrapbook of Newspaper Clippings on the City Charter Amendments, March to October, 1938), TRHPL.

42. Houston *Press,* October 14 and 16, 1935; Houston *Post,* October 15 and 18, 1935; Houston *Chronicle,* October 14, 15, and 18, 1935.

43. Houston *Post,* October 17, 18, 22, 24, 25, and 31, 1935; Houston *Chronicle,* October 15, 16, and 17, 1935; Houston *Press,* October 30, November 2, 4, 13, 14, 15, and 16, 1935; Correspondence Files, 1935, Police Folder No. 46 Motion (no number given), October 15, 1935, Motion 2518, October 16, 1935, Motion 2519, October 16, 1935, Motion 2621 [2521], October 20, 1935, Motion 2567, October 23, 1935, Motion 2566, October 23, 1935, Motion 2741, November 15, 1935, and Motion 2744, November 16, 1935, HCAC.

44. Houston *Chronicle,* October 18, November 14 and 29, 1935; Houston *Post,* October 30, November 6 and 30, 1935; Houston *Press,* October 29, November 4 and 5, 1935.

45. Houston *Press,* December 6 and 14, 1935.

46. *Grota v. Holcombe, et al.* (Tex. Civ. App. 1936), 97 S. W. (2d), pp. 301-306.

47. *Holcombe et al. v. Grota* (Tex. Sup. 1937), 102 S. W. (2d), p. 1041-45.

48. The court found that the position of superintendent of identification was not provided in the ordinance establishing the police department, as was the position of warrant officer. *Holcombe v. Grota* (Tex. Sup. 1937), pp. 1041-42.

49. *City of San Antonio v. Coultress* (Tex. Civ. App. 1914), 169 S. W., pp. 917-922.

50. *Holcombe et al. v. Grota* (Tex. Sup. 1937), p. 1043.

51. See note 25.

52. Harold J. Marburger, ed., *Amendments to Texas Constitution of 1876* (Austin, 1956), p. 33; *The Constitution of the State of Texas* (Austin, 1956), p. 120.